ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
ROBERT J. GLADWIN, JUDGE

DIVISION IV

CACR06-1401

MAY 9, 2007

CALVIN OLDEN APPELLANT	APPEAL FROM THE CRITTENDEN COUNTY CIRCUIT COURT [NO. CR-2005-894R]
V.	HON. DAVID N. LASER, JUDGE
STATE OF ARKANSAS APPELLEE	AFFIRMED

Appellant Calvin Olden appeals the revocation of his probation as found by the Crittenden County Circuit Court. On appeal, he contends that the trial court committed reversible error by denying his motion for directed verdict as to the charge of sexual indecency with a child. We affirm.

On March 27, 2006, appellant pleaded guilty to the charge of possession of a controlled substance and executed a plea and sentence recommendation and conditions of probation. He was placed on five years' supervised probation and assessed fines and costs in the amount of $1,750. The State filed a petition to revoke appellant's probation on June 13, 2006, asserting the following violations: (1) appellant had failed to pay fines, costs, and fees; (2) appellant had failed to report as directed; (3) appellant had failed to pay probation fees; (4) appellant had failed to notify sheriff and probation of current address and employment; (5) appellant had committed rape; (6) appellant had committed sexual indecency with a child; (7)

appellant had failed to work regularly at suitable employment; (8) appellant had possessed and used marijuana and cocaine; (9) appellant had failed to adhere to conditions of parole including alcohol/drug assessment plan. A hearing on the petition was held on April 16, 2006. At the close of the State's case, appellant moved for a directed verdict on all charges, and the trial court granted the motion to all allegations except for rape, sexual solicitation of a child, and failure to pay fines and costs.[1] The trial court found that appellant had violated the terms and conditions of his probation by committing the offenses of rape and sexual indecency with a child. His probation was revoked and he was sentenced to ten years in the Arkansas Department of Correction.

A trial court may revoke a defendant's probation if it finds by a preponderance of the evidence that the defendant has inexcusably failed to comply with a condition of his probation. Ark. Code Ann. § 5-4-309(d). In order to revoke probation or a suspended sentence, the burden is on the State to prove a violation of a condition by a preponderance of the evidence, and on appellate review the trial court's findings will be upheld unless they are clearly against the preponderance of the evidence. *See Richardson v. State*, 85 Ark. App. 347, 157 S.W.3d 536 (2004). Because the burdens are different, evidence that is insufficient for a criminal conviction may be sufficient for a probation or suspended sentence revocation. *Jones v. State*, 355 Ark. 630, 144 S.W.3d 254 (2004). Thus, the burden on the State is not as great in a revocation hearing. *Id.* Additionally, the State need only prove that appellant

[1]The record is confusing with respect to the trial court's decision as to the failure to pay fines and costs, but it does not significantly affect the outcome because of the evidence presented on the other two remaining allegations.

violated any one condition of his probation in order to support revocation. *See Richardson*, *supra*. Since the determination of a preponderance of the evidence turns on questions of credibility and weight to be given to the testimony, we defer to the trial judge's superior position. *Id.*

As an initial matter, we point out that appellant's brief is not in compliance with Rule 4-2 of the Rules of the Arkansas Supreme Court and the Arkansas Court of Appeals, specifically, there is a complete lack of an abstract of the revocation hearing as required by Rule 4-2(a)(5). Although the failure to properly abstract has in the past been considered a bar to consideration of the merits of an argument, this court must now allow rebriefing to cure deficiencies in an abstract. *See Ark. Dep't of Human Servs. v. Collier*, 351 Ark. 380, 92 S.W.3d 683 (2002). We are authorized in such a situation to order rebriefing, wherein appellant would have fifteen days to file a substituted brief, abstract, and addendum that complies with Rule 4-2(a)(5). In this particular case, however, we decline to do so and reach the merits of the appeal. *See Ferguson v. State*, 343 Ark. 159, 33 S.W.3d 115 (2000).

Appellant challenges the revocation only on the ground of sexual indecency with a child and not on the ground of rape. The State need only prove that appellant violated any one condition of his probation in order to support revocation. *See Richardson*, *supra*. One of the conditions of appellant's probation stated that "the defendant shall live a law-abiding life, be of good behavior, and not violate any state, federal, or municipal law." Clearly, the commission of rape, as set forth in Ark. Code Ann. § 5-14-103, violates state law and finding

by a preponderance of the evidence that the offense occurred was sufficient to support the revocation.

Appellant does not challenge on appeal the sufficiency of the evidence with respect to the rape allegation, but even so, sufficient evidence was presented to support the trial court's finding. The twelve-year old victim, B.M., gave specific testimony about the incident, which constitutes sufficient evidence to support a conviction. *See Hanlin v. State*, 356 Ark. 516, 157 S.W.3d 181 (2004). Further, the victim's testimony was corroborated by that of her mother and her fourteen-year old cousin, as well as Officer Joe Baker, and Detective Mark McDougal. Because the State proved by a preponderance of the evidence that appellant violated this particular condition, and because appellant failed to challenge that finding on appeal, we could affirm without even analyzing the evidence regarding the allegation of sexual indecency with a child.

Appellant argues that the State failed to prove that he committed sexual indecency with a child in violation of his conditions of probation. Arkansas Code Annotated section 5-14-110 sets out the parameters of the offense of sexual indecency with a child, in part:

> (a) A person commits sexual indecency with a child if:
> (1) Being eighteen (18) years of age or older, the person solicits another person who is less than fifteen (15) years of age or who is represented to be less than fifteen (15) years of age to engage in:
> (A) Sexual intercourse;
> (B) Deviate sexual activity; or
> (C) Sexual contact[.]

Evidence was presented that appellant, then twenty-nine years old, solicited fourteen-year old T.M. to engage in deviate sexual activity by offering her a ride in his car and stating that he

would do the same thing to her that he did to her twelve-year old cousin, B.M., the rape victim. Appellant argues that there was never an explicit sexual solicitation made to T.M., and that the testimony refers repeatedly only to him saying that he would "do it" or "do something."

The State asserts that appellant's actions toward T.M. reasonably could have been construed by the trial court as a request or temptation for her to engage in deviate sexual activity. We, however, view his comments to be more of a threat to keep T.M. from informing anyone else of what her cousin had told her about the rape incident. It is of no consequence, however, because we hold that there is sufficient evidence to support the circuit court's finding by a preponderance of the evidence that appellant inexcusably failed to comply with a condition of his probation by committing the offense of rape.

Affirmed.

HART and ROBBINS, JJ., agree.